STATE OF MICHIGAN

COURT OF APPEALS

SHIRLEY KOVACK,

Plaintiff-Appellant,

v

DAIMLER CHRYSLER CORP,

Defendant-Appellee.

UNPUBLISHED
May 11, 2006

No. 265761
Oakland Circuit Court
LC No. 2004-061809-NZ

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant. We affirm.

We review de novo a trial court's ruling on a motion for summary disposition. *Tipton v William Beaumont Hosp*, 266 Mich App 27, 32; 697 NW2d 552 (2005). Because the parties relied on matters outside the pleadings, review under MCR 2.116(C)(10) is appropriate. *Id.* We must consider the record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists that precludes entering judgment for the moving party as a matter of law. *Laier v Kitchen*, 266 Mich App 482, 486; 702 NW2d 199 (2005).

Plaintiff argues that the trial court's grant of summary disposition in favor of defendant was improper because there was a material dispute regarding whether her vehicle was still defective on the basis that her complaints were not satisfactorily resolved and objective measurements revealed that the vehicle was out of alignment. Specifically, plaintiff argues that the trial court "plainly chose certain statements by Plaintiff's and Defendant's experts, as well as those by the Plaintiff herself, to support findings that no defect continued to exist in the vehicle and that no harm was suffered by Plaintiff in keeping the vehicle." Plaintiff also argues that the trial court erred by giving inappropriate weight to subjective statements by defendant's expert and ignoring the obvious bias in those statements.

A trial court is not permitted to assess credibility or to determine facts on a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Rather, the trial court must review the record evidence, and all reasonable inferences from the evidence, to decide whether a genuine issue of material fact exists to warrant a trial. *Id.* However, the party opposing a motion for summary disposition must present more than

conjecture and speculation to meet the burden of providing evidentiary proof establishing a genuine issue of material fact. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001). "A conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference." *Id*. at 97-98, quoting *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993).

Documentary evidence revealed that plaintiff's vehicle was serviced on five occasions from August 2003 through February 2004 for her complaint that it "pulled to the right," and that as of February 2004 the dealership could find nothing wrong with the vehicle. Plaintiff's deposition testimony indicated that following the February 2004 service, she drove it without a pulling complaint for an additional 17 months and more than 15,000 miles until July 2005, at which time she leased a different vehicle. Plaintiff takes issue with the trial court's finding that her "deposition testimony does not support a finding that she was compromised due to any alleged defect in the vehicle." However, while plaintiff attested that she was afraid to drive the vehicle, the record supports the trial court's finding because plaintiff did not attest to any instances where the vehicle's alleged pulling problem placed her in danger or resulted in harm.

The trial court properly concluded that plaintiff failed to present documentary evidence establishing the existence of a material factual dispute regarding the alleged defect. Even though her expert's first affidavit indicated that the vehicle was out of alignment, the expert's second affidavit cast doubt on the inference that the alignment problems caused the pulling and indicated that the pulling problem could have been related to other maintenance-related factors such as improper tire inflation, failure to schedule tire rotations at appropriate intervals, and inadequate tire tread. Stated another way, the mere fact that plaintiff provided evidence that her vehicle was out of alignment does not lead to the conclusion that the alignment issue caused the alleged pulling problem. Indeed, plaintiff only presented conjecture and speculation, i.e., "an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference." *Karbel*, *supra* at 97-98, quoting *Libralter*, *supra* at 486. Accordingly, the trial court properly determined that plaintiff failed to meet her burden of providing evidentiary proof establishing a genuine issue of material fact and appropriately granted summary disposition in favor of defendant on that basis.

Plaintiff next argues that, assuming a material factual dispute existed regarding the defective condition of her vehicle, the trial court erred in dismissing all of her other legal claims. However, as noted above, because no genuine issue of material fact existed regarding the existence of the alleged pulling problem, the trial court's consequent grant of summary disposition in favor of defendant on plaintiff's additional claims was proper.[1]

Regarding plaintiff's breach of express warranty claim, defendant's Basic Limited Warranty provides that it "covers the cost of all parts and labor needed to repair any defective

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[1] Plaintiff fails to brief the merits of any allegations of error with respect to trial court's grant of summary disposition in favor of defendant on her revocation of acceptance and Magnuson-Moss Warranty Act, 15 USC 2301 *et seq*., claims; therefore, the issues are deemed abandoned. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

item on your vehicle supplied by DaimlerChrylser Corporation that is defective in material, workmanship, or factory preparation," and that "You pay nothing for these repairs. These warranty repairs or adjustments—including all parts and labor connected with them—will be made by your dealer at no charge, using new or remanufactured parts." The record reveals that warranty repairs were made free of charge to plaintiff each time she presented the vehicle for repair; therefore, no genuine issue of material fact existed regarding a breach of express warranty. *Computer Network, Inc v AM Gen Corp*, 265 Mich App 309, 314; 696 NW2d 49 (2005).

Further, because the express warranty did not fail of its essential purpose, plaintiff is not entitled to recourse under the UCC. See MCL 440.2719(2); MCL 440.2313(1); *Computer Network, supra* at 314-315. "[A] warranty fails of its essential purpose where unanticipated circumstances preclude the seller from providing the buyer with the remedy to which the parties agreed, in which event the buyer is entitled to seek remedies under the standard UCC warranty provisions." *Severn v Sperry Corp*, 212 Mich App 406, 413-414; 538 NW2d 50 (1995), citing *Price Bros Co v Charles J Rogers Constr Co*, 104 Mich App 369, 374-375; 304 NW2d 584 (1981). Here, however, there was no evidence indicating that defendant's express warranty failed of its essential purpose. Indeed, every time plaintiff presented the vehicle, repairs were made within a reasonable time, in most cases within a matter of hours. As in *Computer Network, supra* at 315, "the vehicle was always repaired, returned, accepted, and used," and "[b]ecause there was no question of material fact, summary disposition under MCR 2.116(C)(10) was appropriate."

Regarding plaintiff's breach of implied warranty of merchantability claim, no genuine issue of material fact existed because plaintiff failed to demonstrate that the vehicle was defective when it left the possession of the manufacturer or seller. *Computer Network, supra* at 316-317, quoting *Guaranteed Constr Co v Gold Bond Products*, 153 Mich App 385, 392-393; 395 NW2d 332 (1986). Plaintiff makes much of the notion that privity is not required for breach of implied warranty claims, in response to defendant's argument that the implied warranty claim should be dismissed on the grounds that plaintiff was only in privity with the dealership. However, regardless of whether privity is required to assert a breach of implied warranty claim, plaintiff's claim fails on the grounds that she was unable to demonstrate a genuine issue of material fact that a defect existed by providing proof that the vehicle was not reasonably fit for its intended, anticipated, or reasonably foreseeable use or that it was not of average quality in the industry. See MCL 440.2314(2)(c); *Computer Network, supra* at 316-317, quoting *Guaranteed Constr, supra* at 392-393.

Regarding her claim under the Michigan Consumer Protection Act, MCL 445.901 *et seq*., plaintiff argues that the trial court's grant of summary disposition in favor of defendant on the ground that no genuine issue of material fact existed regarding breach of warranties was error. While a breach of an express or implied warranty constitutes a violation of the MCPA, *Mikos v Chrysler Corp*, 158 Mich App 781, 783; 404 NW2d 783 (1987), various unpublished decisions of this Court, although not binding, MCR 7.215(C)(1), indicate that proof of breach of warranty is not a prerequisite to maintaining a claim under the MCPA. See *Prose v Sun & Ski Marina*, unpublished opinion per curiam of the Court of Appeals, issued December 9, 2005 (Docket No. 245823); *Gadula v General Motors Corp*, unpublished opinion per curiam of the Court of appeals, issued January 5, 2001 (Docket No. 213853). Nonetheless, plaintiff failed to create a

genuine issue of material fact that defendant engaged in "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce [that were] unlawful" under MCL 445.903(1). Accordingly, the trial court's grant of summary disposition in favor of defendant on plaintiff's MCPA was proper.

Regarding plaintiff's claim of breach of the duty of good faith, the trial court properly determined that summary disposition in favor of defendant was appropriate because no genuine issue of material fact existed regarding whether defendant acted in "good faith," i.e., with "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." MCL 440.2103(1)(b). While MCL 440.1203 provides that "[e]very contract or duty within this act imposes an obligation of good faith in its performance or enforcement," plaintiff conceded at her deposition that defendant never lied to her and that she merely felt that defendant did not "live[] up to their warranty." However, because no genuine issue of material fact existed regarding breaches of express or implied warranties, plaintiff's claim of breach of the duty of good faith also fails.

Finally, regarding plaintiff's lemon law claim under MCL 257.1401 *et seq*., the trial court properly determined that summary disposition in favor of defendant was appropriate because plaintiff failed to present documentary evidence establishing the existence of a material factual dispute regarding the continuing existence of the alleged defect or a condition with the vehicle that impaired its use or value. "In addition to demonstrating the existence of a reasonable number of repairs under either MCL 257.1403(5)(a) or (5)(b), there must be a showing that a *reported condition under MCL 257.1402 continues to exist* before a remedy may be obtained. MCL 257.1403(1)." *Computer Network*, *supra* at 328. Although plaintiff reported the alleged defect to the dealer within the requisite time provided by statute, MCL 257.1402, and assuming *arguendo* that she showed that the same alleged defect or condition was subject to repair by the dealer at least four[2] times within two years of the date of the first attempt to repair the defect or condition, MCL 257.1403(5)(a), she failed to demonstrate that the alleged defect or condition continued to exist or that it impaired the use or value of the vehicle. MCL 257.1403(1). Plaintiff reported the alleged pulling problem on five occasions from August 2003 until March 2004. However, the record does not support a finding that the alleged pulling problem impaired the use or value of vehicle. Indeed, plaintiff continued to drive the vehicle for an additional 17 months without complaint of the alleged pulling problem, at which time she traded the vehicle into the dealership for a value of approximately $19,000, an amount sufficient to pay off the remaining amount owing on the vehicle. Further, the record does not support a finding that the alleged pulling problem continued to exist. Plaintiff's expert attested that he did not verify the alleged

[2] Defendant argues that the visits to the dealership where no problem was found should not be counted toward the number of times the vehicle was "subject to repair." Plaintiff argues that each presentation to the dealership should be counted toward the number of times the vehicle was "subject to repair," regardless of whether any repairs were actually performed. However, we need not reach this question because plaintiff failed to demonstrate a genuine issue of material fact concerning the additional statutory requirements of showing that the alleged pulling condition continued to exist or that it impaired the use or value of the vehicle.

pulling problem, defendant's expert reported that following a road test he was unable to find a pulling problem, and the dealership could find nothing wrong with the vehicle.

Plaintiff next argues that the trial court abused its discretion in refusing to consider her untimely supplemental brief. We disagree. It is within the trial court's discretion to enter a scheduling order establishing times for events the court deems appropriate, MCR 2.401(B)(2), and the court rules "implicitly confer the discretion to decline to entertain actions beyond the agreed time frame." *People v Grove*, 455 Mich 439, 469; 566 NW2d 547 (1997). An abuse of discretion occurs when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 254; 701 NW2d 144 (2005).

We find no abuse of discretion because the trial court was entitled to consider defendant's untimely reply brief while declining to consider plaintiff's untimely supplemental brief. Further, to the extent plaintiff argues that she was prejudiced as a result of the trial court's failure to consider her supplemental brief and the attached affidavit of another expert, the record reveals that the affidavit attesting that the improper alignment of the vehicle caused the pulling problem was of negligible value, because it merely constituted a conclusory assertion based on the inspection of the vehicle done by plaintiff's first expert. Finally, plaintiff's argument that the trial court should have considered the affidavit because it rebutted new evidence submitted with defendant's reply is without merit because the affidavit was signed one day before defendant's reply was filed.

While plaintiff correctly notes that the law favors the determination of claims on the merits, *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229; 600 NW2d 638 (1999), she incorrectly characterizes the trial court's grant of summary disposition as the imposition of a dismissal as a sanction. See *Vicencio v Ramirez*, 211 Mich App 501, 506-507; 536 NW2d 280 (1995). Instead, the trial court properly reviewed the merits of plaintiff's claim and granted summary disposition in favor of defendant on the basis that plaintiff had failed to establish genuine issues of material fact entitling her to a trial. MCR 2.116(C)(10).

We affirm.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Jessica R. Cooper